

State of Indigent Defense in Texas

TAPS 3rd Annual Conference
and Training Institute
“Pretrial Matters”

Sam Houston State University –
The Woodlands Center
The Woodlands, TX

April 7, 2016

**Texas Indigent Defense
Commission**

Don Hase, Commission Member

Jim Bethke, Executive Director



Who We Are

Thirteen-member governing board administratively attached to the Office of Court Administration. Jim Bethke is the Executive Director. The Commission has eleven full-time staff.

OFFICERS:

Honorable Sharon Keller	Chair – Presiding Judge, Court of Criminal Appeals
Honorable Olen Underwood	Vice-Chair – Presiding Judge, 2 nd Administrative Judicial Region of Texas

EX OFFICIO MEMBERS:

Honorable Sharon Keller	Austin, Presiding Judge, Court of Criminal Appeals
Honorable Nathan Hecht	Austin, Chief Justice, Supreme Court of Texas
Honorable Sherry Radack	Houston, Chief Justice, First Court of Appeals
Honorable Brandon Creighton	Conroe, State Senator
Honorable John Whitmire	Houston, State Senator
Honorable Abel Herrero	Robstown, State Representative
Honorable Andrew Murr	Kerrville, State Representative

MEMBERS APPOINTED BY GOVERNOR:

Honorable Olen Underwood	Conroe, Presiding Judge, 2 nd Administrative Judicial Region of Texas
Honorable Jon Burrows	Temple, Bell County Judge
Honorable Linda Rodriguez	Hays County
Mr. Anthony Odiorne	Burnet, Assistant Public Defender, Regional Public Defender Office for Capital Cases
Mr. Don Hase	Arlington, Attorney, Ball & Hase

What We Do

Our Purpose

To provide financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

Our Grant Program

In FY 2015 \$30.9 million awarded to Texas counties.
Formula grant awards totaled \$24 million (254 Counties).
Discretionary grants totaled \$6.9 million (18 Counties) .

Our Fiscal and Policy Monitoring Program

The Commission monitors each county that receives a grant to ensure state money is being properly spent and accounted for and to enforce compliance by the county with the conditions of the grant, as well as with state and local rules and regulations.

Our Innocence Program

Since 2005 the Commission has provided up to \$100,000 annually to the University of Texas School of Law, the Texas Tech University School of Law, the Thurgood Marshall School of Law at Texas Southern University, and the University of Houston Law Center to operate innocence clinics. In 2015 the 84th Legislature expanded funding to include \$100,000 per year for two new public law schools at the University of North Texas Dallas College of Law and the Texas A&M University School of Law in Fort Worth. This funding has contributed towards 13 exonerations.

Agenda

- ❖ Background
- ❖ Timing of Appointment
- ❖ Screening for Indigence
- ❖ Pretrial and Bail Related Issues

Gideon vs. Wainwright

In our adversarial system of criminal justice....

With government “quite properly” spending “vast sums of money to establish machinery to try defendants accused of crime”.....you need

..... “procedural and substantive safeguard designed to assure fair trials before impartial tribunals in which defendants stands equal before the law”

“This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”

Long Road to Make Indigent Defense Meaningful

Gideon vs. Wainwright

Texas Fair Defense Act

1963

2001

2016

15 Years of
Implementation

Struggle to translate at state level the “right to counsel” into a meaningful indigent defense system

Pre-Fair Defense Act through Present

Prior to 2002

No state funding or oversight

No reporting requirements on spending or caseloads

No uniformity in local indigent defense appointment practices

No consistent standards regarding attorney training and experience

Judges' discretion to select counsel, pay fees and determine who is indigent fueled appearance of cronyism

Inconsistent quality of death penalty representation

Present

Key process standards implemented

State provides some funding to support indigent defense

Commission created to provide oversight

Counties now report indigent defense plan and expense information to Commission

Attorney caseload and practice-time reporting pursuant to HB 1318 (83rd Legislature)

Attorney training and qualification standards adopted

Death penalty appellate attorney qualifications established

***Rothgery v.
Gillespie County***
128 S. Ct. 2578

Decided June 23, 2008



Questions Answered by the Supreme Court in *Rothgery*

- Does an Article 15.17 hearing (magistration) in Texas mark the initiation of adversary judicial proceedings, “with the consequent state obligation to appoint counsel within a reasonable time after a request for assistance is made”?
- Answer: Yes
(128 S. Ct. at 2583-84)

“[A] criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”

(128 S. Ct. at 2592)

Questions Answered by the Supreme Court in *Rothgery*

- Does the right to counsel attach at the Article 15.17 hearing even if a prosecutor is not aware of or involved in its conduct?
- Answer: Yes
(128 S. Ct. at 2581)

Questions Answered by the Supreme Court in *Rothgery*

- Is an indictment or information required in order to commence adversary judicial proceedings and cause the right to counsel to attach?
- Answer: No
(128 S. Ct. at 2586, citing *Michigan v. Jackson*, 475 U.S. 625, 639 n.3 (1986))

After the Article 15.17 Hearing, When Must the Court Appoint Counsel for an Indigent Defendant?

Under Federal Constitutional Law?

- “[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.”

(*Rothgery*, 128 S. Ct. at 2591)

- Defendants are entitled to counsel to help them prepare for critical-stage proceedings, and to decide whether to undergo optional/voluntary critical-stage proceedings.

(*Estelle v. Smith*, 451 U.S. 454, 471 (1981))

Example of Critical-Stage Proceedings

- Interrogations after the Art. 15.17 Hearing
- Line-Ups after the Art. 15.17 Hearing
- Examining Trials
- Psychiatric Exams
- Plea Negotiations
- Arraignment
- Pre-Trial Hearings
- Trial

Under the State Law?

If the Defendant is in Custody:

“[I]f an indigent defendant is entitled to and requests appointed counsel and if adversarial judicial proceedings have been initiated against the defendant, the appointing authority **shall** appoint counsel as soon as possible,” but not later than **1 to 3 working days** (depending on county size) . . .

(Texas Code of Criminal Procedure art. 1.051(c))

Under State Law?

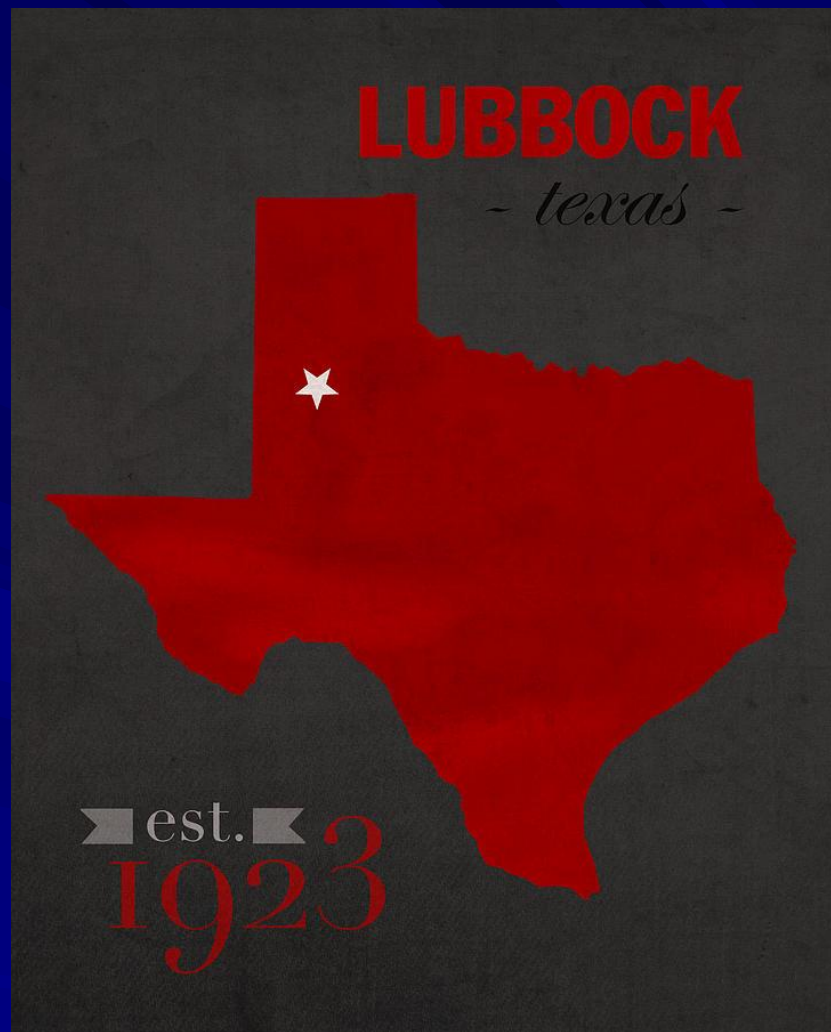
If the Defendant is Released on Bond:

“Notwithstanding any other provision of this section, if an indigent defendant is released from custody prior to the appointment of counsel under this section, appointment of counsel is not required until the defendant’s first court appearance or when adversarial judicial proceedings are initiated, **whichever comes first.**”

(Texas Code of Criminal Procedure art. 1.051(j))

Wilbur v. City of Mt. Vernon, 989 F.Supp.2d 1122 (2013)

Footnote #5 “. . . Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their workloads are unmanageable. Without reasonable caseloads, even the most dedicated lawyers cannot do a consistently effective job for their clients. A warm body with a law degree, able to affix his or her name to a plea agreement, is not an acceptable substitute for the effective advocate envisioned when the Supreme Court extended the right to counsel to all persons facing incarceration.”



Map source: fineartamerica.com



Effective Indigence Screening

September 2015

URL: <http://tidc.texas.gov/media/40461/effective-indigence-screening-final.pdf>

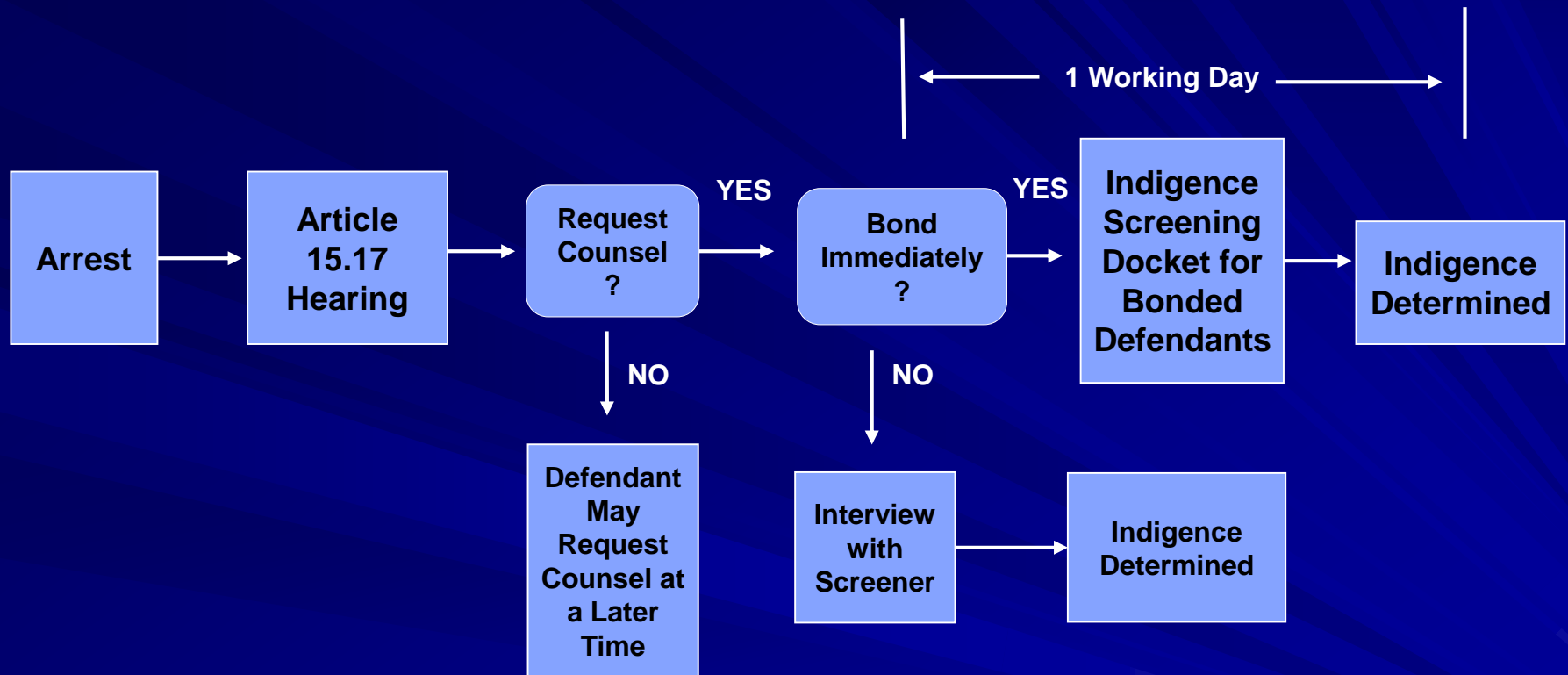
Code of Criminal Procedure

Art. 26.04. Procedures for Appointing Counsel

(m) In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

URL: <http://tidc.texas.gov/media/41826/fda-codified-10-12-15.pdf>

Procedure for Determining Indigence in Tarrant County



Use of Bail Schedules

Since the beginning of 2015, at least nine class action challenges to money bail systems have been filed in seven states. Most challenge the use of a fixed bail schedule to detain indigent arrestees.

- The case law on bail has generally relied on the Constitution's guarantee of due process or its outright ban on excessive bail.
- Courts have long held that bail decisions must be individualized, based not solely on the crime but the defendant's history and community ties.
- Recent cases have utilized the Equal Protection Clause to argue that the poor cannot be detained based on an arrestee's wealth.

Use of Bail Schedules

One of these cases, Varden v. City of Clanton, drew national attention in the wake of the United States Department of Justice's decision to file a Statement of Interest in the case asserting:

“any bail or bond scheme that mandates payment of prefixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the 14th Amendment's Equal Protection Clause, but also constitutes bad public policy.”

In response to the litigation, the City of Clanton announced that it would reform its bail system to stop using secured money bond for new arrestees.

Use of Bail Schedules

- While bail schedules may provide consistency across courts and defendants, Texas law mandates that bail determinations must be made on a **case-by-case basis**.
 - Article 17.15, CCP provides that the factors to be considered in setting bail include the detainee's ability to make bail, the circumstances of the alleged offense, and the future safety of the victim.
 - Texas courts have stated that the factors to be considered also include the bail applicant's work record, family ties, residency, prior criminal record, adherence to previous bail bond conditions, outstanding bonds, and aggravating circumstances of alleged offense.



U.S. Department of Justice

Civil Rights Division

Office for Access to Justice

Washington, D.C. 20530

March 14, 2016

Dear Colleague:

The Department of Justice (“the Department”) is committed to assisting state and local courts in their efforts to ensure equal justice and due process for all those who come before them. In December 2015, the Department convened a diverse group of stakeholders—judges, court administrators, lawmakers, prosecutors, defense attorneys, advocates, and impacted individuals—to discuss the assessment and enforcement of fines and fees in state and local courts. While the convening made plain that unlawful and harmful practices exist in certain jurisdictions throughout the country, it also highlighted a number of reform efforts underway by state leaders, judicial officers, and advocates, and underscored the commitment of all the participants to continue addressing these critical issues. At the meeting, participants and Department officials also discussed ways in which the Department could assist courts in their efforts to make needed changes. Among other recommendations, participants called on the Department to provide greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices. Accordingly, this letter is intended to address some of the most common practices that run afoul of the United States Constitution and/or other federal laws and to assist court leadership in ensuring that courts at every level of the justice system operate fairly and lawfully, as well as to suggest alternative practices that can address legitimate public safety needs while also protecting the rights of participants in the justice system.

Recent years have seen increased attention on the illegal enforcement of fines and fees in certain jurisdictions around the country—often with respect to individuals accused of misdemeanors, quasi-criminal ordinance violations, or civil infractions.¹ Typically, courts do not sentence defendants to incarceration in these cases; monetary fines are the norm. Yet the harm

¹ See, e.g., Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf (finding that the Ferguson, Missouri, municipal court routinely deprived people of their constitutional rights to due process and equal protection and other federal protections); Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Tees%20and%20Fines%20FINAL.pdf> (reporting on fine and fee practices in fifteen states); American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf (discussing practices in Louisiana, Michigan, Ohio, Georgia, and Washington state).

Rethinking Money Bail



URL:

http://www.abajournal.com/magazine/article/courts_are_rethinking_bail/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email



<https://youtu.be/IS5mwymTIJU>

"ALL AMERICA WANTS TO KNOW"





<https://youtu.be/V1UssmRqTHw>





<https://youtu.be/q6OWLeqnyhY>

Pretrial Assessment Dashboard	
New Criminal Activity (NCA) Score	
1 2 3 4 5 6	
	
 Elevated risk of violence	
Failure to Appear (FTA) Score	
1 2 3 4 5 6	
	
Current Charge(s)	Recommendation
<ul style="list-style-type: none">• Aggravated assault, first degree• Poss. marijuana	Release not recommended

